

## § 750.2

## 12 CFR Ch. VII (1–13 Edition)

charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IAP has not violated certain laws or regulations or has not engaged in certain unsafe or unsound practices or breaches of fiduciary duty, unless the administrative action or civil proceeding has resulted in a final prohibition order against the IAP.

(1) *Troubled condition* means any Federally insured credit union that meets the criteria as described in § 701.14(b)(3) and (4) of this chapter, or has been granted assistance described in sections 208 or 216 of the Act.

[76 FR 30517, May 26, 2011, as amended at 76 FR 36980, June 24, 2011]

### § 750.2 Golden parachute payments prohibited.

A Federally insured credit union must not make or agree to make any golden parachute payment, except as permitted by this part.

### § 750.3 Prohibited indemnification payments.

A Federally insured credit union must not make or agree to make any prohibited indemnification payment, except as permitted by this chapter.<sup>1</sup>

### § 750.4 Permissible golden parachute payments.

(a) A Federally insured credit union may agree to make or may make a golden parachute payment if:

(1) NCUA, with written concurrence of the appropriate state supervisory authority in the case of a state chartered credit union or corporate credit union, determines the payment or agreement is permissible; or

(2) An agreement is made in order to hire a person to become an IAP at a time when the Federally insured credit union satisfies or in an effort to prevent it from imminently satisfying any of the criteria in § 750.1(e)(1)(ii), and NCUA, with written concurrence of the appropriate state supervisory authority in the case of a state chartered credit union or corporate credit union, consents in writing to the amount and

terms of the golden parachute payment. NCUA's consent will not improve the IAP's position in the event of the insolvency of the credit union since NCUA's consent cannot bind a liquidating agent or affect the provability of claims in liquidation. In the event the credit union is placed into conservatorship or liquidation, the conservator or the liquidating agent will not be obligated to pay the promised golden parachute and the IAP will not be accorded preferential treatment on the basis of any prior approval; or

(3) A payment is made pursuant to an agreement that provides for a reasonable severance payment, not to exceed twelve months' salary, to an IAP in the event of a merger of the Federally insured credit union; provided, however, that a Federally insured credit union must obtain the consent of NCUA before making a payment and this paragraph (a)(3) does not apply to any merger of a Federally insured credit union resulting from an assisted transaction described in section 208 of the Act, 12 U.S.C. 1788, or the Federally insured credit union being placed into conservatorship or liquidation; and

(4) A Federally insured credit union or IAP making a request pursuant to paragraphs (a)(1) through (3) of this section must demonstrate it does not possess and is not aware of any information, evidence, documents or other materials indicating there is a reasonable basis to believe, at the time the payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the Federally insured credit union that has had or is likely to have a material adverse effect on the Federally insured credit union;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator liquidating agent for, or the troubled condition, as defined by § 750.1(1), of the Federally insured credit union;

(iii) The IAP has materially violated any applicable Federal or state law or regulation that has had or is likely to have a material effect on the Federally insured credit union; or

(iv) The IAP has violated or conspired to violate sections 215, 656, 657,

<sup>1</sup>The provisions in this part 750 control to the extent of any inconsistency with § 701.33 of this chapter.

## National Credit Union Administration

## § 750.6

1005, 1006, 1007, 1014, 1032, or 1344 of title 18 of the United States Code, or sections 1341 or 1343 of that title affecting a Federally insured financial institution, as defined in title 18 of the United States Code.

(b) In making a determination under paragraphs (a)(1) through (3) of this section, NCUA may consider:

(1) Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;

(2) The length of time the IAP was affiliated with the Federally insured credit union and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(3) Any other factors or circumstances indicating the proposed payment would be contrary to the intent of section 206(t) of the Act or this part.

### § 750.5 Permissible indemnification payments.

(a) A Federally insured credit union may make or agree to make reasonable indemnification payments to an IAP, including advanced funds to pay or reimburse reasonable legal fees or other professional expenses incurred by an IAP in an administrative proceeding or civil action initiated by NCUA or a state regulatory authority if:

(1) The Federally insured credit union's board of directors, in good faith, determines in writing after due investigation and consideration that:

(i) The IAP acted in good faith and in a manner he or she believed to be consistent with his or her fiduciary duty;

(ii) The advancement or payment of the expenses will not materially adversely affect the credit union's safety and soundness; and

(iii) The IAP has the financial capability or has otherwise made appropriate financial arrangements sufficient to repay the advance if required in accordance with this rule; and

(2) The IAP provides:

(i) A written affirmation of his or her reasonable good faith belief that he or she acted in a manner believed to be consistent with his or her fiduciary duty; and

(ii) An agreement in writing to reimburse the Federally insured credit

union, to the extent not covered by payments from insurance or bonds purchased pursuant to § 750.1(k)(2)(i), for that portion of any advanced indemnification payments which ultimately become prohibited indemnification payments as defined in § 750.1(k); and

(3) The indemnification payments do not ultimately constitute prohibited indemnification payments as defined in § 750.1(k).

(b) An IAP seeking indemnification payments must not participate in any way in the board of director's discussion and approval of such payments; however, the IAP may present his or her request to the board and respond to any inquiries from the board concerning his or her involvement in the circumstances giving rise to the administrative proceeding or civil action.

(c) In the event a majority of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the remaining members of the board may authorize independent legal counsel to review the indemnification request and provide the remaining members of the board with a written opinion of counsel as to whether the conditions in paragraph (a)(1) through (3) of this section have been met. If independent legal counsel concludes that the conditions have been met, the remaining members of the board of directors may rely on the opinion in authorizing the requested indemnification.

(d) In the event all of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the board will authorize independent legal counsel to review the indemnification request and provide the board with a written opinion of counsel as to whether the conditions in paragraph (a)(1) through (3) of this section have been met. If independent legal counsel concludes the conditions have been met, the board of directors may rely on the opinion in authorizing the requested indemnification.

### § 750.6 Filing instructions; appeal.

(a) Requests to make excess non-discriminatory severance plan payments pursuant to § 750.1(e)(2)(v) and